

## **EXPLANATORY STATEMENT**

Subject— *Public Service Act 1999*

*Public Service Amendment (Miscellaneous Measures) Regulations 2018*

The *Public Service Act 1999* (the ‘Act’) provides for the establishment and management of the Australian Public Service (‘APS’).

Subsection 79(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. The Act contains other provisions that authorise the making of regulations<sup>1</sup>.

The purpose of the *Public Service Amendment (Miscellaneous Measures) Regulations 2018* (the ‘Amendment Regulations’) is to amend the *Public Service Regulations 1999* (the ‘Principal Regulations’) to exempt members of the Fair Work Commission (‘FWC’) from the Australian Public Service (‘APS’) Code of Conduct (‘Code’), and to clarify certain operational matters in connection with the review functions of the Merit Protection Commissioner (‘MPC’). These amendments support the policy intentions of the Principal Regulations.

### **Overview of the amendments**

#### **Statutory office holder bound by Code of Conduct**

Subsection 14(1) of the Act provides that Agency Heads and statutory office holders are bound by the Code, subject to regulations made under subsection 14(2A).

Regulation 2.2 of the Principal Regulations provides that statutory office holders are bound by the Code in relation to their dealings with APS employees, in a supervisory or other capacity.

Paragraph 2.2(2)(c) of the Principal Regulations exempts several classes of office holder from the Code, including members of the Australian Defence Force, judicial appointments, and members of certain boards and tribunals.

Members of the FWC are statutory office holders presently bound by the Code. The FWC Member Code of Conduct, updated in January 2018, sets out the FWC’s responsibility to provide a safe workplace and obliges Members to ‘treat all [FWC] staff and other Members with respect, courtesy, and without harassment’.

As FWC members are covered by the FWC Member Code of Conduct, it is considered unnecessary that they be covered by a separate code with significant overlap.

The Amendment Regulations therefore exempt FWC members from the Code.

---

<sup>1</sup> For the purposes of the Amendment Regulations, these include subsections 14(2A), 14(3), 33(1) and (2), and 50(1)(e).

### Applications for primary review

APS employees are entitled to review of certain matters relating to their employment. Subregulation 5.24(1) of the Principal Regulations provides that applications for primary review may generally be made to the **relevant** Agency Head. In certain circumstances, the relevant Agency Head may not be the employee's current Agency Head.

Subregulation 5.23(4) prescribes circumstances where an action is not reviewable or ceases to be reviewable. One of these prescribed circumstances is where an employee fails to apply to **the employee's Agency Head** for primary review within 120 days. This language is inconsistent with subregulation 5.24(1), which provides that applications for primary review may be made to an Agency Head other than the employee's Agency Head (provided the other Agency Head is the **relevant** Agency Head).

The purpose of the amendment is to ensure the language used by subregulation 5.23(4) is consistent with subregulation 5.24(1).

### Review of determination of breach of Code of Conduct by former APS employee

Division 7.3 of the Principal Regulations provides that one of the MPC's functions is to review determinations of breach of the Code by **former** APS employees. If the MPC conducts a review of this type, regulation 7.2D requires the MPC to make a recommendation to the relevant Agency Head and to provide reasons for the recommendation.

The purpose of new regulation 7.2DA is to set out steps that must be taken by an Agency Head following receipt of a recommendation by the MPC under regulation 7.2D. The inclusion of new regulation 7.2DA is intended to remove any doubts about an Agency Head's capacity to act on a recommendation by the MPC. The amendment is consistent with existing regulation 5.32 in respect of reviews requested by current (i.e. not former) APS employees.

### **Consultation**

Both the FWC and the MPC specifically requested the amendments relevant to them. In relation to the FWC amendment, this only affects FWC members, and accordingly no further consultation was required on the amendments to paragraph 2.2.(2)(c) of the Principal Regulations.

In relation to the MPC amendment to Subregulation 5.23(4) and inserting new regulation 7.2DA, these are technical amendments to give effect to the original policy intention. Similarly, no consultation was required.

### **Regulation Impact Statement**

No regulation impact statement is required for the measures contained in the Amendment Regulations.

## **Statement of Compatibility with Human Rights**

A Statement of Compatibility with Human Rights has been completed for the Amendment Regulations, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Amendment Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***Overview of the Amendment Regulations***

The Amendment Regulations amend the Principal Regulations to exempt members of the FWC from the Code, and to clarify certain operational matters in connection with the MPC's review functions.

### ***Human rights implications***

The Amendment Regulations engage the right to work and rights in work.

The right to work and rights in work are contained in Articles 6(1), 7, and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights.

Exempting FWC members from the Code does not curtail APS employees' rights in work. FWC members' conduct, including in relation to APS employees, is regulated by the FWC Members' Code of Conduct and obligations under the *Fair Work Act 2009*. The Members' Code of Conduct includes the FWC's responsibility to provide a safe workplace, and obliges members to 'treat all [FWC] staff and other Members with respect, courtesy, and without harassment'. As FWC members are covered by the FWC Members' Code of Conduct, exempting FWC members from the Code will have little practical impact.

Section 33 of the Act provides that an APS employee is entitled to review of any APS action that relates to his or her APS employment. The right to review is supported by one of the Employment Principles in section 10A of the Act, which provides that the APS is a career-based public service that makes fair employment decisions with a fair system of review.

The Amendment Regulations clarify certain operational matters in connection with the MPC's review functions. This is intended to improve the operational efficiency and effectiveness of the review of action framework and provide greater clarity and certainty to employees.

The Amendment Regulations promote APS employees' rights in work.

### ***Conclusion***

The Amendment Regulations are compatible with human rights.

Detail of the Amendment Regulations are included in the [Attachment](#).

The Amendment Regulations commence on the day after the instrument is registered.

Authority: Subsection 79(1) of the *Public Service Act 1999*

## **Details of the *Public Service Amendment (Miscellaneous Measures) Regulations 2018***

### **Section 1—Name of Regulations**

This section provides that the title of the Amendment Regulations is the *Public Service Amendment (Miscellaneous Measures) Regulations 2018*.

### **Section 2—Commencement**

This section provides for the Amendment Regulations to commence on the day after they are registered on the Federal Register of Legislation.

### **Section 3—Authority**

This section provides that the Amendment Regulations are made under the *Public Service Act 1999*.

### **Section 4—Schedule(s)**

This section provides that each instrument that is specified in a Schedule to the Amendment Regulations is amended or repealed as set out in the applicable items in the relevant Schedule, and that any other item in a Schedule to the Amendment Regulations has effect according to its terms.

### **Schedule 1—Amendments.**

#### **Item [1]—Insertion of subparagraph 2.2(2)(c)(viii)**

Paragraph 2.2(2)(c)(viii) provides that an appointment as a member of the FWC is not a prescribed appointment for the purposes of the definition of a statutory office holder in subsection 14(3) of the Act. This has the effect of exempting FWC members from the Code.

#### **Item [2]—Substitution of table item 1, column headed ‘Action’**

This item omits the words ‘an affected employee’s Agency Head’, and substitutes ‘the relevant Agency Head’.

#### **Item [3]—Insertion of regulation 7.2DA**

This item inserts new regulation 7.2DA, which provides for actions to be taken by an Agency Head on receipt of a recommendation under regulation 7.2D in relation to a former APS employee. The new provision is similar to regulation 5.32 of the Principal Regulations in relation to a current employee.

Subregulation 7.2DA(1) provides that if an Agency Head receives a recommendation under regulation 7.2D of the Principal Regulations, the Agency Head must as soon as possible consider the recommendation and make a decision about the recommendation.

Subregulation 7.2DA(2) provides that the Agency Head may confirm the relevant determination, vary the determination, or set the determination aside and make a new determination.

Subregulation 7.2DA(3) provides that if an Agency Head acts in accordance with a recommendation made under regulation 7.2D of the Principal Regulations, the Agency Head is not required to seek the view of the affected former employee before acting on the recommendation.

A note to subregulation 7.2DA(3) explains that the views of the APS employee have already been sought by the MPC during the review in accordance with the principles of procedural fairness.

Subregulation 7.2DA(4) provides that new subregulation 7.2DA(2) does not limit the relevant Agency Head's employer powers in relation to the determination or the affected former employee.

An example given is that an Agency Head may take other appropriate action to rectify effects of the determination, or to restore the affected former employee to the position they would have been in had the determination not been made.

Subregulation 7.2DA(5) provides that if, after receiving a recommendation from the MPC under 7.2D of the Principal Regulations, the agency head was considering making a finding of a breach of the Code that was different from:

- the original finding made by the agency head, or
- a finding recommended by the MPC,

then the Agency Head must follow their procedures for determining suspected breaches of the Code before making that finding.

Subregulation 7.2DA(6) provides that the Agency Head must inform the affected former employee and the MPC in writing of the decision they have made about the MPC's recommendation, and the reasons for that decision.

#### **Item [4]—Insertion of Division 10.2**

This item provides for transitional arrangements in relation to amendments made by the Amendment Regulations.

Regulation 10.12 provides that paragraph 2.2(2)(c) of the Principal Regulations as amended by the Amendment Regulations applies in relation to a person who is a member of the FWC on or after the day Schedule 1 to the Amendment Regulations commences ('Commencement Day').

Regulation 10.13 provides that new regulation 7.2DA applies in relation to a recommendation made under regulation 7.2D of the Principal Regulations received by an Agency Head on or after Commencement Day, and which results from a review of a determination under Division 7.3 of the Principal Regulations that began before, on, or after Commencement Day.

#### **Item [5]—Dictionary (definition of *member of the Fair Work Commission*)**

This item inserts a new definition of 'member of the Fair Work Commission' in the Dictionary to the Principal Regulations. The term is defined to have the same meaning as 'FWC member' in section 12 of the *Fair Work Act 2009*.